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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

**MIYOKO'S KITCHEN,**

Plaintiff,

**v.**

**KAREN ROSS, in her official capacity as  
Secretary of the California Department of  
Food and Agriculture, and STEPHEN  
BEAM, in his official capacity as Branch  
Chief of the Milk and Dairy Food Safety  
Branch,**

Defendants.

3:20-cv-00893-RS

**DECLARATION OF DR. STEPHEN  
BEAM IN SUPPORT OF DEFENDANTS'  
OPPOSITION TO MOTION FOR  
PRELIMINARY INJUNCTION**

Date: August 13, 2020<sup>1</sup>  
Time: 1:30 p.m.  
Courtroom: 3  
Judge: Honorable Richard Seeborg

Trial Date: Not Set  
Action Filed: February 6, 2020

<sup>1</sup> This motion is noticed motion under Northern District of California Local Rule 7-2, with hearing automatically vacated pursuant to Northern District of California General Order 72.

1 I, Stephen Beam, declare:

2 1. I am the Chief of the Milk and Dairy Food Safety Branch of the California  
3 Department of Food and Agriculture. In that official capacity I am a defendant in this action.  
4 The statements contained in this Declaration are based on my own personal knowledge and if  
5 called to testify I could and would competently testify thereto. This is my second declaration in  
6 this matter.

7 2. I have held my current position for 16 years, and I have worked at the Department of  
8 Food and Agriculture (“the Department”) for nearly 21 years. I hold a Ph.D. in Animal Science  
9 from Cornell University.

10 3. The Department is responsible for the application and enforcement of state and  
11 federal statutes and regulations concerning food labeling. Among these statutes and regulations  
12 are standards of identity. A standard of identity is a definition of a type of food based on  
13 commonly used names. Standards of identity apply to all kinds of foods, including grain  
14 products, meats, dairy products, and substitutes for dairy products. It is the policy of the  
15 Department to enforce these rules across all food industries.

16 4. Although all food industries are governed by standards of identity, the Department’s  
17 practices for how to enforce standards of identity are tailored to specific industries. In the case of  
18 dairy products and products that resemble dairy products, state statutes require review and  
19 approval of labels by the Department prior to their use.

20 5. The Milk and Dairy Food Safety Branch (“the Branch”) is responsible for the  
21 Department’s review and approval of food labels for milk, frozen and cultured dairy products,  
22 cheese, and products resembling milk products. California Food and Agricultural Code section  
23 32912.5 assigns this duty to the Department, and the Department assigns it to the Branch.

24 6. The Milk and Dairy Food Safety Branch receives thousands of labels for approval  
25 each year. During the period of January 1, 2019 through May 31, 2020, the Branch reviewed  
26 over 3,000 labels, about 10% of which required revision. The Branch sent over 90 letters during  
27 this period informing manufacturers that compliance with regulations required changes to their  
28 labels.

1           7.     The system of standards of identity allows the Department to regulate a large number  
2 of products by applying uniform rules across entire sectors. Relying on standards of identity  
3 rooted in ordinary usage, most of which have a long history as recognized names for food, allows  
4 the Branch to review and approve a large volume of labels each year. This serves the statutory  
5 mandate, *see* Cal. Food & Agric. Code §§ 32701, 32912.5, 32913, 32914 & 38902, of preventing  
6 false, misleading, and deceptive marketing and unfair competition while maintaining a level  
7 playing field. In the context of butter, this means that products traditionally understood as  
8 butter—made from milk or cream and 80% milk fat—are identified as butter. Other products—  
9 whether they contain some dairy ingredients or not—may not be called butter.

10           8.     For the most part, the Department and the California legislature have limited  
11 discretion concerning standards of identity. With few exceptions, federal law preempts state law,  
12 setting nationwide standards of identity. States have the power to determine their own method of  
13 enforcement, and states may decline to enforce standards of identity altogether, but states cannot  
14 enforce standards of identity contrary to federal statutes and regulations.

15           9.     Because federal and state law separately defines butter alternatives such as margarine  
16 and spreads, the Branch reviews and approves labels for “products resembling milk products” but  
17 does not review labels for margarines or spreads. This does not mean margarines and spreads are  
18 exempt from regulation; they may still be subject to enforcement for misbranding. But those  
19 labels need not be approved by the Branch.

20           10.    Products labeled as “butter,” whether they are made from milk or cream, made from  
21 plants with some dairy product added, or made entirely from plants are subject to review by the  
22 Branch.

23           11.    Based on my experience and my review of Department records, Miyoko’s was the  
24 first 100% plant-based product the Department reviewed that identified itself as butter.<sup>2</sup> Since  
25 receiving Miyoko’s label, the Department has also received labels for additional products  
26 identified as butter that do not satisfy the standard of identity for butter.

27 \_\_\_\_\_  
28           <sup>2</sup> Conversely, I am unaware of any producer whose product that satisfied the standard of  
identity for butter seeking approval of a label that does not identify the product as “butter.”

1           12. The Department's position is that it is required by state statutes to approve or require  
2 modification to Miyoko's labels, and that under relevant federal law and regulations, including  
3 the federal standard of identity for butter, codified at 21 U.S.C. § 321a, and the federal description  
4 of the misbranding of food, 21 CFR § 101.18, Miyoko's label is not permissible.

5           13. The Department sent the letter dated December 9, 2019 (ECF No. 1-1) to Miyoko's,  
6 stating the Department's position that the product cannot be identified as "butter."

7           14. Consistent with the confidentiality requirement stated in California Food and  
8 Agricultural Code Section 38946, the Department sent the December 9 letter only to Miyoko's.  
9 The Department did not publicize the letter.

10           15. The December 9 letter was not the result of a request or other comment originating  
11 outside the Department asking for enforcement against Miyoko's. The Department received no  
12 such request.<sup>3</sup>

13           16. The Department is aware that there are other types of products that use the term  
14 butter, including peanut butter and fruit butters. These products have been sold for decades and  
15 have their own federal standards of identity. Both peanut butter and fruit butter have federal  
16 standards of identity dating back to the 1970s. *See* Peanut Butter, 21 CFR §§ 164.110 (first  
17 promulgated by Tree and Peanut Products, 42 Fed. Reg. 14,475 (March 15, 1977)), Fruit Butter,  
18 21 C.F.R. § 150.110 (first promulgated by Fruit Butter, 42 Fed. Reg. 14,445 (March 15, 1977)).  
19 These terms describe ingredients in the products (peanuts, fruit). The Department acknowledges  
20 that the federal government made a distinction based on ordinary usage and history to assign  
21 standards of identity to peanut butter and fruit butters through a federal rulemaking process, and  
22 the Department applies those standards of identity.

23           17. The use of dairy terms is not the only aspect of a product label that the Branch  
24 reviews. The Department also requires that labels be truthful. For example, the Department does  
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26           <sup>3</sup> After Miyoko's filed this lawsuit, the Department received one email from a trade  
27 association concerning Miyoko's. That email message included, as an attachment, a publicly  
28 available document submitted to the federal Food and Drug Administration seeking regulatory  
action concerning the labeling of dairy substitute products. The Department has already provided  
a copy of this email exchange to Miyoko's.

1 not approve labels that use the phrase “hormone free” for products that contain hormones. The  
2 Branch applies this principle to dairy and plant-based products.

3 18. For Example, the Department is aware of consumer concern over the use of rBST, an  
4 FDA-approved artificial growth hormone injected into cows to increase milk production. For  
5 manufacturers wanting to market products made from the milk of cows not treated with rBST, the  
6 Branch has approved labels that clearly state that the products were made from cows not treated  
7 with rBST.

8 19. Miyoko’s label claims that the product is hormone free. The Department understands  
9 this claim is not true; the plants used to make Miyoko’s “vegan butter” product contain  
10 endogenous hormones. The December 9 letter identifies this concern and asks Miyoko’s to  
11 change its label.

12  
13 I declare that the foregoing statements are true and correct under penalty of perjury.  
14 Executed this day, July 16, 2020, in Sacramento, California.

15 /s/ Stephen Beam  
16 STEPHEN BEAM

17  
18 As the attorney e-filing this document, attorney Michael S. Dorsi attests that Stephen  
19 Beam has concurred in the filing of this document. /s/ Michael S. Dorsi

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